STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MAJED A. SHOHATEE,

Defendant-Appellant.

UNPUBLISHED
February 4, 2003

No. 231394
Wayne Circuit Court
LC No. 99-006888

Before: White, PJ, and Kelly and Gribbs*, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of assault with intent to commit murder, MCL 750.83 and first-degree criminal sexual conduct (force or coercion), MCL 750.520b(1)(f). The trial court sentenced defendant to concurrent terms of eleven years and three months to twenty-three years' imprisonment. We affirm.

I. Basic Facts and Procedural History

The victim testified that on the evening of June 22, 1999, she went to a bar with her friends. When she became separated from her friends, she went to another bar look for them. At Carmen's Bar, the victim saw defendant, whom she knew from working at defendant's brother's restaurant. When the victim expressed her wish to go home, defendant offered to drive her. Defendant and the victim left Carmen's bar, but went to Aloha's Bar before the victim again asked to be driven home. Instead of driving the victim home, defendant drove to an alley where he beat and raped her. The victim testified that after striking her multiple times, defendant pulled off her shoes, jeans, and underwear, and penetrated her with something that "felt like steel and hard, like a tool." Ultimately, the victim was found hiding in some bushes and was taken to a hospital by ambulance.

An emergency room physician, Patricia Wilkerson, M.D., testified that the victim was able to answer questions, but was hysterical. The victim's blood alcohol level was .212, but she was able to converse and answer questions. Wilkerson described the victim's injuries including a bleeding 1½-centimeter internal vaginal laceration and a large external vaginal hematoma. Wilkerson said the lacerations were not consistent with normal vaginal intercourse, but with an object, such as a crowbar, being inserted. The victim suffered abrasions around her rectum and

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

multiple contusions on her face, arms, back and chest. The victim also sustained a broken nose, a lacerated liver and a rib fracture.

At the hospital, the victim told Detroit Police Officer Jeb Rutledge that her attacker was a man with whom she used to work named Majed. The victim was on pain medication during this interview. The victim's description of the attacker was "male, twenties, Majed Nassar, black hair, mustache, six[-]foot, thin build . . . ." She referred to defendant as Majed Nassar because she thought that was his name. Officer Rutledge testified that the victim told him defendant drove a light-colored minivan. However, at trial, the victim testified that defendant drove a two-door Neon.

Based on the victim's description, police arrested and questioned defendant. Defendant admitted he knew the victim from a restaurant his brother had owned and that he saw her the night of the assault. Defendant also said that during the early morning hours of June 23, 1999, "he left the bar, Stempien's Bar located on Martin just south of Michigan Avenue, that he went to Rally's Restaurant to pick up some food for his wife to take it home to her, and that was between the hours of 2:00 [a.m.] and 3:00 [a.m.]"

II. Great Weight of the Evidence

Defendant first argues that his conviction was against the great weight of the evidence. However, defendant failed to preserve this issue for appeal by timely moving for a new trial. MCR 2.611(A)(1)(e); *People v Patterson*, 428 Mich 502, 514-515; 410 NW2d 733 (1987); *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997). In any event, we have reviewed the lower court record and conclude that the verdict was not against the great weight of the evidence.

A verdict is against the great weight of the evidence only if the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow it to stand. *People v Lemmon*, 456 Mich 625, 641; 576 NW2d 129 (1998); *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). This Court may not attempt to resolve credibility questions anew, but rather, credibility questions should be left to the trier of fact. *Lemmon*, *supra* at 646-647; *Gadomski*, *supra* at 28.

Defendant argues that the verdict was against the great weight of the evidence because the victim's testimony was inconsistent and her blood alcohol content was .212 when she spoke to police officers about her attack. However, conflicting testimony or questions of credibility are sufficient grounds for granting a new trial only if the impeached testimony was deprived of all probative value. *Lemmon*, *supra* at 642-643. At trial, the victim explained the inconsistencies between her trial testimony and statements to the police stating, "I don't remember what exactly I told those two officers. I had just got through being rape[d] and beat [sic], and assaulted, you know. I don't know what exactly was going through my mind." Nonetheless, the victim's testimony and statements to the police were consistent in identifying defendant, the brother of her former employer, as her attacker. Additionally, defendant's witnesses' testimony did not deprive the victim's testimony of all probative value. One witness' testimony was repeatedly inconsistent with that of other witnesses. A witness also claimed she had never seen defendant at Carmen's Bar, yet defendant was arrested there just days after the attack. Moreover, defendant

admitted that he saw the victim on the night of the attack. Therefore, we find that the verdict was not against the great weight of the evidence.

III. Sufficiency of the Evidence

Next, defendant argues that insufficient evidence was presented to support a finding that he committed assault with intent to murder. We disagree.

This Court reviews de novo a claim of insufficient evidence. *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995). When reviewing a claim of insufficient evidence, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). The prosecution need not negate every reasonable theory consistent with innocence, but need only convince the jury of the defendant's guilt in the face of whatever contradictory evidence the defendant presents. *Id.* at 400. All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

The elements of assault with intent to commit murder are (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). "Circumstantial evidence and the reasonable inferences that arise from the evidence can constitute satisfactory proof of the elements of the crime." *Id.*

In this case, the victim testified she was hit repeatedly in the face and head with a crowbar. A doctor testified to the victim's extensive injuries including an internal vaginal laceration, external vaginal hematoma, multiple contusions, a broken nose, a lacerated liver and a rib fracture. Further, the victim testified that defendant did not stop beating her until she pretended to be dead. Therefore, we find there was sufficient evidence for a rational trier of fact to find defendant's guilt beyond a reasonable doubt.

IV. Defendant's Presence at Testimony Play-back

Defendant next argues that he was denied due process when the trial court permitted a play-back of testimony in the absence of defendant or defense counsel. We disagree.

The decision whether to allow the jury to rehear testimony is discretionary and rests with the trial court. *People v Carter*, 462 Mich 206, 218; 612 NW2d 144 (2000); MCR 6.414(H). MCR 6.414(H) provides:

> If, after beginning deliberation, the jury requests a review of certain testimony or evidence, the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request. The court may order the jury to deliberate further without the requested review, so long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed.

It is well established that a defendant has the right to be present at all stages of the trial where his substantial rights may be affected. *People v White,* 144 Mich App 698, 704-705; 376 NW2d 184 (1985).

In this case, during deliberations, the jury requested the testimony of the victim and other witnesses. The trial court stated that the transcripts were not ready, but that a play-back would be provided. When the trial court requested the parties' input on its response to the jury's request, defense counsel stated only that it preferred that the victim's testimony be read back in its entirety, rather than partially. After further discussions on this matter, the trial court decided that the court reporter and deputy would be present during the play-back. In response to this decision, defense counsel indicated that he would not be present during the play-back because he had another trial; he stated, "I'm not even needed this afternoon . . . it doesn't look like they are going to be deliberating this afternoon." The trial court then began to instruct the jury prompting defense counsel to interject, "[I]t's my understanding that we're talking about the tape recording of each different witness will be read back." The trial court responded, "That's correct, the tape, the audiotape will be read back." The trial court then instructed the jury:

> Now, the procedure is that the Court Reporter will begin the playing of the tape, and she's going to play the tape all the way through to the end of that witness' testimony. You cannot talk to the Reporter. You cannot talk to the deputy. You just have to listen and that's why I'm going [to] permit you to take notes. You can take notes during the read-back, but you cannot ask the Court Reporter to stop it there and replay it, and continue on—you can't do that. She's going to start the tape and the tape is going to go all the way through that testimony witness' testimony [sic].

Based on this record, we conclude that defendant waived his objection to the method employed by the trial court in playing back the testimony. *Carter, supra* at 213-217.[1] Such a waiver effectively extinguishes any error. *Id.* at 216.

We also reject defendant's claim that reversal is required because he was denied the effective assistance of counsel on this basis. Because defendant did not raise this issue in an appropriate motion in the trial court, our review is limited to mistakes apparent on the record. *People v Hurst,* 205 Mich App 634, 641; 517 NW2d 858 (1994). A defendant's claim that counsel's assistance was so defective as to require reversal of a conviction has two components. *People v Hoag,* 460 Mich 1, 5-6; 594 NW2d 57 (1999), citing *People v Pickens,* 446 Mich 298; 521 NW2d 797 (1994) and quoting *Strickland v Washington,* 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). First, the defendant must show that counsel's performance was deficient. *Id.* Second, the defendant must show that the deficient performance prejudiced the defense. *Id.* In attempting to persuade a reviewing court that counsel was ineffective, a defendant must also overcome the presumption that the challenged action was trial strategy, and must establish "a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." *Id.* at 6, quoting *People v Johnson,* 451 Mich 115, 124; 545 NW2d 637 (1996).

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[1] An approval of the trial court's response constitutes a waiver, whereas a failure to object constitutes a forfeiture. *Carter, supra* at 215-216.

A decision to approve a trial court's response to a jury's request for a review of testimony is akin to an evidentiary decision which is a matter of trial strategy. *Carter, supra* at 218-219. In matters of trial strategy, this Court does not substitute its own judgment or assess competence with the benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). Even if we did conclude that defense counsel erred in approving the play-back outside defendant's presence, we cannot conclude that this error was outcome determinative. Defendant's mere presence during the play-back would have had no effect on the outcome. While defendant argues that he could have discerned any inaccuracies in the audiotape, defendant has provided no indication that there were inaccuracies. Moreover, there was ample record evidence on which rational triers of fact could conclude that defendant was guilty beyond a reasonable doubt. Therefore, we find that defendant was not denied the effective assistance of counsel on this basis.

V. Prosecutorial Misconduct

Defendant also argues that the prosecutor argued facts not in evidence during closing argument. We disagree. Generally, claims of prosecutorial misconduct are reviewed de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). A prosecutor's arguments are examined in context, case-by-case, to determine whether the remarks denied the defendant a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). A prosecutor may argue that the facts and evidence show a witness is not worthy of belief and is not required to state inferences and conclusions in the blandest possible terms. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

In this case, one witness' testimony was often inconsistent with that of other witnesses. Additionally, a bar employee claimed never to have seen defendant, yet he was arrested at the bar just days after the assault. Therefore, the prosecutor properly argued that the facts and evidence showed that the witnesses were not worthy of belief. Because there was no misconduct, we also reject defendant's argument that defense counsel was ineffective for failing to object.

VI. Jury Instructions

Defendant also argues that he was not informed of the accusation against him because the trial court instructed the jury on a version of the offense not charged in the information. We disagree.

To preserve an instructional issue, a defendant must object to the instruction before the jury deliberates. MCR 2.515(C). Because the alleged error was not properly preserved,[2] we review this issue for plain error affecting defendant's substantial rights. *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001), citing *People v Carines*, 460 Mich 750, 766-767; 597 NW2d 130 (1999). This Court reviews jury instructions in their entirety to determine whether there is error requiring reversal. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d

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[2] Defense counsel objected after the jury was excused and deliberations commenced.

67 (2001). We will not reverse a conviction if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id.*

We find no error in the trial court's jury instructions. The information charged defendant with causing the victim personal injury. The jury was instructed, "Personal injury means bodily injury, disfigurement, chronic pain, pregnancy, disease, loss or impairment of a sexual or a reproductive organ or mental anguish." Personal injury under MCL 750.520a(j) includes bodily injury and mental anguish. In *People v Asevedo*, 217 Mich App 393, 397; 551 NW2d 478 (1996), this Court stated that bodily injury and mental anguish are different ways of defining the element of personal injury and are not alternative theories. *Id*. Therefore, defendant had sufficient notice of the charge against him.

Defendant further argues that the trial court gave a misleading instruction to the jury regarding a statement he made to the police. We disagree. The trial court instructed the jury as follows, "The prosecution has introduced evidence of a statement that it claims the defendant made. You cannot consider such an out of court statement as evidence against the defendant unless you do the following things . . . ." At trial, a police officer testified that defendant stated that he saw the victim on the night of the attack. The jury instructions referred to this as a statement, not a confession, that the prosecution claimed defendant made. Therefore, the instruction was not erroneous.

VII. Sentencing Adjournment

Defendant finally argues that he was denied his right to allocution and to the effective assistance of counsel of his choosing at sentencing because the trial court refused to adjourn sentencing. We disagree. The decision to adjourn a sentencing hearing is within the trial court's discretion and is reviewed for an abuse of that discretion. *People v Dilling*, 222 Mich App 44, 53; 564 NW2d 56 (1997).

Although the right to counsel encompasses the right to counsel of one's choosing, this right is balanced with the public's interest in the prompt and efficient administration of justice. *People v Krystopaniec*, 170 Mich App 588, 598; 429 NW2d 828 (1988). Here, defendant had ample opportunity to obtain counsel of his choosing before the sentencing hearing. While defendant claimed his family hired another attorney, no appearance had been filed, and the trial court received no notification from this attorney. Further, defendant spoke at the hearing, and the trial court did not refuse to allow witnesses to speak on defendant's behalf. Defendant knew the date of his sentencing hearing, yet did not ensure the witnesses' presence. Therefore, we find no abuse of discretion.

Affirmed.

/s/ Helene N. White
/s/ Kirsten Frank Kelly
/s/ Roman S. Gribbs